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In The
Supreme Court of the United States

October Term, 1991

LAWRENCE C. PRESLEY, individually and on behalf
of others similarly situated,

Appellant,

vs.

ETOWAH COUNTY COMMISSION,

Appellee.

ED PETER MACK and NATHANIEL GOSHA, III,
individually and on behalf
of others similarly situated,

Appellants,

vs.

RUSSELL COUNTY COMMISSION,

Appellee.

On Appeal From The United States District Court
For The Middle District Of Alabama

REPLY BRIEF OF THE APPELLANTS

EDWARD STILL
Counsel of Record
714 South 29th Street
Birmingham AL 35233-2845
205-322-6631

PAMELA KARLAN
University of Virginia
School of Law
Charlottesville VA 22901
804-924-7810

JAMES U. BLACKSHER
JOHN C. FALKENBERRY
LESLIE M. PROLL
Title Bldg., Fifth Floor
300 21st Street North
Birmingham AL 35203
205-322-1100

LANI GUINIER
Law School of University
of Pennsylvania
3400 Chestnut Street
Philadelphia PA 19104-6204
215-898-7032

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Argument in Reply

Put simply, appellees' briefs read as if they were written in an historical vacuum. They completely ignore Congress' purpose in enacting, and thrice extending, § 5: to assure that the voting rights of black citizens in jurisdictions such as Russell and Etowah Counties are not effectively nullified by the substitution of subtle and ingenious tactics for outright disenfranchisement. Instead, appellees advance a narrow, formalistic notion of the right to vote that has been repeatedly rejected by Congress, the Attorney General, and this Court. They suggest that as long as a jurisdiction disguises changes in its voting standards, practices, and procedures by calling them something innocuous--like a "common fund resolution" (Etowah County) or a "ministerial" reallocation of authority (Russell County)--it can ignore with impunity Congress' carefully considered judgment that preclearance of all such changes is critical to the protection of minority voting rights. Congress did not enact the Voting Rights Act as just another weapon for attacking discrete acts of state officials designed to discriminate against black people. Rather, the purpose of the Voting Rights Act is to ensure that the institutional structures and rules by which such discrete decisions are made provide blacks full and equal participation in the political process.

Appellants' reply brief proceeds in four parts. First, we review the background, ignored by the appellees, against which § 5 was enacted in 1965, and was extended in 1970, 1975, and 1982, to show that § 5's central purpose was to protect black voters from the erection of new barriers to full participation in the political process. Second, we restate the standard to be applied by courts faced with claims of § 5's *coverage* (that is, local three-judge courts, and this Court, when it reviews their decisions): if, the nature of the challenged change is such that, under *any* set of facts, the Attorney General or the United States District Court for the District of Columbia *could* conclude that the challenged

change¹ has either the purpose or the effect of denying the right to vote, a jurisdiction must seek preclearance. The final two sections show how the Etowah and Russell County enactments fall within the scope of § 5.

I. Section 5 was adopted in reaction to covered jurisdictions' long history of cunning stratagems for denying effective voting rights to their black citizens.

Congress' decision to enact § 5's "stringent" and "extraordinary" preclearance process, *McCain v Lybrand*, 465 US 236, 244 (1985), was the product of its experience with the intransigent refusal of Southern jurisdictions, including Alabama, to comply with constitutional, statutory, and judicial commands guaranteeing black citizens the right to vote.

A. A brief history of disenfranchisement efforts in Alabama.

The Fifteenth Amendment and the Alabama Constitution of 1867 gave black citizens the formal right to vote for the first time in Alabama history. See *United States v Alabama*, 252 FSupp 95, 97 (MD Ala 1966) (3-judge court). But following the end of Reconstruction, white supremacists regained control of the state government and sought, in a variety of both subtle and direct ways, to eliminate black political power. The state legislature passed a series of local laws giving the governor the power to appoint county commissions in "counties threatened with black voting majorities." *Dillard v Crenshaw County*, 640 FSupp 1347,

1. In this case, it is essentially undisputed that both the Etowah Common Fund Resolution and Act 79-652's transfer of roadwork authority from the Russell County Commission were "changes" from pre-existing procedures. Appellees argue only that they were not changes "with respect to voting."

1358 (MD Ala 1986).² In 1893, the legislature passed the so-called "Sayre Law," which enacted a complex set of registration requirements, deprived illiterate voters of real assistance in casting their ballots, and effectively eliminated Republicans and Populists from local registration and election boards. The Sayre Law caused a tremendous drop in black political participation. *Brown v Board of School Commissioners*, 542 FSupp 1078, 1091 (SD Ala 1982). In 1894, a number of counties moved from district-based to at-large elections to dilute the voting strength of those blacks who still voted. *Dillard*, 640 FSupp at 1358.

At its 1901 Constitutional Convention, Alabama adopted a new constitution one of whose "major purpose[s] ... was to disenfranchise black persons." *Id.*; see also *Hunter v Underwood*, 471 US 222, 229 (1985) (purpose of the 1901 Alabama Constitutional Convention was "to establish white supremacy in this State," according to the president of the Convention); *United States v Alabama*, 252 FSupp at 98-99 (delegates to the 1901 convention "were anxious to provide devices that would avoid a legal attack based on the Fourteenth and Fifteenth Amendments but still successfully subvert the purpose of those amendments"). Because of the adoption of a series of techniques--among them a poll tax;³ a grandfather clause; and good character, education, residence, employment, and property qualifications, see *id.* at 99--by 1909, "all but approximately 4,000 of the nearly 182,000 black persons of voting age had been removed from the rolls of eligible voters." *Dillard*, 640 FSupp at 1358; see also *United States v Alabama*, 252 FSupp at 99 (100,000 black Alabamians had voted in 1900, but by 1908, only 3742 were even registered).

In addition, during the first two-thirds of this century, Alabama was essentially a one-party state. Until 1946, the Alabama Democratic Party maintained a white primary. *Brown*,

2. Appellee Etowah County Commission was one of the named defendants in *Dillard v Crenshaw County*.

3. In *United States v Alabama*, the three-judge district court held that the poll tax violated the Fifteenth Amendment.

542 FSupp at 1092. Since the Democratic nomination was tantamount to election, there was little reason for even those blacks who could register and vote to participate, since their votes in the general election were essentially meaningless. When, however, this Court outlawed white primaries in *Smith v Allwright*, 321 US 649 (1944), the specter of genuine black participation in the electoral process prompted Alabama to adopt the "Boswell Amendment," which granted local boards of registrars sweeping discretion designed to "enable them to prevent from registering those elements in our community [i.e., blacks] which have not yet fitted themselves for self-government." *Brown*, 542 FSupp at 1092 (internal quotation marks omitted). Ultimately, a three-judge court struck down the Boswell Amendment as a purposeful attempt to prevent blacks from voting. *Davis v Schnell*, 81 FSupp 872, 879-81 (SD Ala 1949) (3-judge court), *aff'd*, 336 US 933 (1950).

Despite the plethora of formal and informal barriers placed in their way, increasing numbers of black citizens began to seek to register and to vote during the 1950's. The state legislature and local officials responded to this trend by devising new mechanisms for minimizing black political power. Perhaps the most notorious was the Tuskegee gerrymander, *see Gomillion v Lightfoot*, 364 US 339 (1960), which redrew the city limits to exclude all but a handful of Tuskegee's black residents. Blacks could continue to vote in other elections, but they were no longer in a position to elect city officials. In addition, the legislature employed such tactics as outlawing single-shot voting,⁴ enacting numbered-place requirements, and replacing district-based elections with at-large elections, for the purpose of further diluting black voting strength. *Dillard*, 640 FSupp at 1356, 1357, 1359. Even if blacks were able to register and to vote, these devices would prevent them from "electing one of their own race," *id.* at 1357 (quoting a state senator's explanation of the purpose of banning single-shot voting).

4. For an explanation of why bans on single-shot voting can impair black voting strength, *see, e.g., City of Rome v United States*, 446 US 156, 184 (1980); US Commission on Civil Rights, *The Voting Rights Act: Ten Years After 206-07* (1975).

Put simply, as soon as one avenue for excluding blacks from the political process was cut off, state and local officials sought another. As one district court—upon whose observation Congress explicitly relied in explaining the need for § 5, *see* S. Rep. No. 162, 89th Cong., 1st Sess., *reprinted in* 1965 US Code, Cong. & Ad. News 2508, 2550 (joint views of 12 members of the Judiciary Committee) [hereafter "1965 Senate Report"]—noted:

[I]n spite of [repeated] judicial declarations [forbidding various discriminatory schemes], the evidence in this case makes it clear that the defendant State of Alabama ... continues in the belief that some contrivance may be successfully adopted and practiced for the purpose of thwarting equality in the enjoyment of the right to vote by citizens of the United States

United States v Penton, 212 FSupp 193, 201-02 (MD Ala 1962) (3-judge court) (internal quotation marks omitted).

B. Congress' commitment to preventing further "contrivances" for diluting the black vote.

Among other things, the Voting Rights Act of 1965 suspended the use of various tests and devices that had been used to prevent blacks from registering and voting in jurisdictions such as Alabama. But experience under legislation passed in 1957, 1960, and 1964 had shown "the ingenuity and dedication of those determined to circumvent the guarantees of the 15th amendment," H.R. Rep. No. 439, 89th Cong., 1st Sess. (1965), *reprinted in* 1965 US Code, Cong. & Ad. News 2437, 2441. "Barring one contrivance too often has caused no change in result, only in methods." *Id.*; *see also* 1965 Senate Report at 2543.

It was "[i]n order to preclude such future State or local circumvention of the remedies and policies of the 1965 act" that Congress passed § 5. H.R. Rep. No. 91-397, 91st Cong., 2d Sess. (1970), *reprinted in* 1970 Cong. Code & Ad. News. 3283 [hereafter "1970 House Report"]; *see also South Carolina v Katzenbach*, 383 US 301, 335 (1965) (noting that covered states

standards, practices, or procedures with respect to voting" not in effect on November 1, 1964. The purposes behind the Voting Rights Act, as well as its subsequent accomplishments, are certainly laudable. However, this Court should affirm the lower court's ruling that Russell County's conversion to the unitary road system is exempt from preclearance and that the application of § 5 is not without "limited compass."⁷

The Appellants are challenging Appellee Russell County Commission's 1979 legislative enactments which converted the county's road system from a district or semi-district system to a unitary system. This legislation shifted responsibility for day-to-day supervision of road authority in the rural districts from individual commissioners once elected at-large to a county road engineer appointed by the county commission as a whole.

The three-judge court below properly recognized that its role in assessing Russell County's 1979 legislation was to look for "potential for discrimination", the triggering mechanism of § 5. The court found that this local legislation, by which minor government powers are reallocated effecting no change in constituency, falls outside the purview of § 5.

The lower court's holding is clearly justified by the reasoning *implicit* in several Supreme Court cases and

⁷ This term is taken from Justice Harlan's concurrence and dissent in *Perkins v. Matthews*, 400 U.S. 379, 398 (1966).

explicit in several district court cases considering the "coverage" issue. This reasoning, termed by the Appellees a "change in constituency" analysis, contends that where minor powers are merely shuffled among government officials who are responsible to the same electorate or constituency, there simply is no potential for discrimination. This case can be contrasted with the "normal" § 5 case where the proposed change dramatically effects a shift in constituency, i.e., a switch from district elections to at-large elections.

Moreover, the district court's ruling is clearly correct given Alabama's law characterizing the road duties in question as being purely ministerial. Since the Russell County Commission held general supervisory authority over the county road operations both before and after 1979, only shifting the delegation of routine ministerial duties, there really was no change in terms of the Voting Rights Act.

Additionally, the Alabama Middle District Court's ruling is supported by the statutory construction of § 5 and the legislative intent behind the Voting Rights Act. The impetus behind the Voting Rights Act was the elimination of obstacles to blacks exercising their right to vote, i.e., poll tests, and the augmentation of black voter registration. The act in general, and § 5 specifically, was intended to prevent such states from reimposing obstacles to black voter registration and was not intended to intrude upon the day-to-day operation of local governments.

Finally, in considering the reality behind the implementation of Russell County's unitary system in 1979, it

is significant that the plan advocated by the Appellants, equal distribution of road funds and resources between the districts regardless of need – though this has never been the law or practice in Russell County – would actually harm many black constituents. It is apparent that the Appellant's main complaint is simply a lack of discretionary funding to spend in their districts.

WHEREFORE, PREMISES CONSIDERED, the Appellee Russell County Commission requests that this Court affirm the lower court's ruling and hold that Russell County's 1979 legislation installing the unitary road system is exempt from the Voting Rights Act's preclearance requirements.

ARGUMENT

LOCAL LEGISLATION WHICH MERELY SHIFTS MINISTERIAL ROAD DUTIES FROM INDIVIDUAL COUNTY COMMISSIONERS ELECTED AT-LARGE TO A ROAD ENGINEER RESPONSIBLE TO THE COUNTY COMMISSION AS A WHOLE DOES NOT CONSTITUTE A "CHANGE" WITHIN THE MEANING OF SECTION 5 OF THE VOTING RIGHTS ACT AND THEREFORE DOES NOT REQUIRE PRECLEARANCE.

- A. The three-judge court correctly found that minor reallocations of local governmental powers among elected officials where there is no change in constituencies fall outside the purview of Section 5's preclearance requirements because there exists no potential for discrimination.**

The three-judge court below recognized that its duty was simply to determine whether the Russell County,

Alabama's 1979 road and bridge enactments constituted a change under § 5 of the Voting Rights Act of 1965⁸ creating a "potential for discrimination."⁹ JS A-8. After fully considering the facts before them and applying the relevant law, Alabama's Middle District concluded that a reallocation of local governmental authority which does not effect a "significant relative change in the powers exercised by government officials" and which does not change the constituencies to which the officials are responsible, is not a "change" within the meaning of § 5 of the Voting Rights Act. JS A-13, 14.

- 1. The District Court's ruling is not inconsistent with prior Supreme Court cases defining the scope of § 5 coverage.**

While never having addressed the specific issue of whether § 5 would require preclearance of routine reallocations of ministerial governmental duties which result in no change in constituency, this Court has certainly left the door open for the formulation of a "change in constituency limitation" in § 5 coverage. In 1984, the factual backdrop of *McCain v. Lybrand*, 465 U.S. 236, set the stage for the Court to determine whether § 5 applied to minor

⁸ Section 5 has been encoded at 42 U.S.C. § 1973c, hereafter "§ 5". Section 5 is reprinted in full at A-3.

⁹ Appellants' contention that the three-judge panel below exceeded its scope of review looking past the threshold coverage inquiry of "potential for discrimination" into substantive considerations is insupportable. Even a cursory review of the lower decision indicates that the court did not deviate from accepted Section 5 modes of analysis.

reallocations of power, including jurisdiction over roads, and the impact of a change in constituencies. *Id.* at 239. Unfortunately, because the contested South Carolina act put into force more substantial changes (conceded to come within § 5's coverage), and the main issue focused upon an interpretation of previous Justice Department preclearance approval, the Court never reached the minor reallocations of power enacted by the South Carolina legislation nor the impact of a change in constituency. *See Id.* at 250 n.17. Such questions were left by this Court, somewhat prophetically, for "future proceedings." *Id.* at 250 n.17.¹⁰

Whereas this honorable Court may have never used the term "change in constituencies", many of this Court's § 5 rulings appear to be, in fact, rooted in a "change in constituency" analysis. For example, when a suspect political subdivision converts from district representation to at-large representation, the "change" creates a potential for discrimination because "[v]oters who are members of a racial minority might well be in the majority in one district, but in a decided minority in the county as a whole." *Allen v. State Board of Elections*, 393 U.S. 544, 569 (1969). Justice Stewart conducted a similar analysis in *Georgia v. United States*, 411 U.S. 526, 534 (1973), where he framed the coverage issue to be "whether such changes [single member to multimember districts] have the potential for diluting the value of the Negro vote." To state the obvious: the potential for vote dilution arises when there

¹⁰ The Court's meaning was of course that the questions listed would be addressed by the district court upon remand.

is a change in constituencies. Clearly, Chief Justice Warren and Justice Stewart engaged in what the Appellee has termed, for want of a better expression, a "change in constituency" analysis.

Similarly, reapportionment and annexation schemes fall within § 5 because their very purpose is to change the makeup of a constituency, thereby creating a potential for minority voting strength dilution. *See McDaniel v. Sanchez*, 452 U.S. 130, 134 (1981) (reapportionment); and *Perkins v. Matthews*, 400 U.S. 379, 388 (1971) (annexation); *accord*, *Pleasant Grove v. United States*, 479 U.S. 462, 467 (1987), and *Richmond v. United States*, 422 U.S. 358, 362 (1975).

The remaining § 5 coverage cases decided by this Court have addressed legislation of the nature which discourages minority candidates from seeking elective office, thus making the minority's vote ineffective, *see, e.g., Dougherty County Board of Education v. White*, 439 U.S. 32, 37 (1978) (rule requiring Board of Education employees seeking elective office to take unpaid leave of absence during campaign periods), and *Hadnott v. Amos*, 394 U.S. 358, 362-65 (1969) (practice requiring minority candidates to undergo obstacles not required for white candidates). The Alabama District Court specifically found that this line of cases was "basically inapposite" and factually distinguishable from the Appellants' situation in the present case. *See JS A-15, n.14.*

2. The District Court's ruling is consistent with previous district court decisions which emphasize the presence of a change in constituencies as being evidence of potential for discrimination.

Following this Court's lead in conducting what was, in essence, a "change of constituency" analysis, *see supra*, the lower courts coined the phrase "different constituencies" or "changed . . . constituency", finding the analysis quite helpful in resolving § 5 coverage close calls. Apparently, the first district court case to explicitly rely upon a "change in constituency" analysis to define § 5's scope was *Horry County v. United States*, 449 F.Supp. 990, 995 (D.C.D.C. 1978). The court explained that,

An alternate reason for subjecting the new method of selecting the Horry County governing body to Section 5 preclearance is that the change involved reallocates governmental powers among elected officials voted upon by different constituencies. Such changes necessarily affect the voting rights of the citizens of Horry County, and must be subjected to Section 5 requirements. *Cf. Perkins v. Matthews, supra; Allen v. State Board of Elections, supra.*

Id. Note that the three-judge district court did not see themselves as formulating a "novel" § 5 coverage theory; rather, the court was simply relying upon the Supreme Court's reasoning in *Perkins* and *Allen, supra*. *See Id.*

The "different constituency" paradigm was elevated from "an alternate reason for subjecting . . . [a change] . . . to Section 5 preclearance", *Id.* (emphasis added), to "the most relevant attribute of the challenged act" in *Hardy v. Wallace*, 603 F.Supp. 174, 178 (N.D. Ala.

1985) (emphasis added). In *Hardy*, the change in constituencies and resultant discriminatory potential created by Alabama's Act No. 507 in 1983 is quite illustrative of why the "change in constituency" analysis is so particularly effective in assessing § 5 coverage. In 1975, the Alabama legislature created the Greene County Racing Commission whose members were to be appointed by the all white legislative delegation representing Greene County at the time. *Id.* at 175. The powers of the commission were significant since the county racetrack would become the county's largest employer and would be responsible for 63% of the county's tax revenue. *Id.* at 176. In 1983, when it became clear that a reapportionment plan gave blacks the power to elect black candidates to the Greene County legislative delegation,¹¹ the Alabama legislature responded by transferring the power to appoint racing commission members from the Greene County legislative delegation to the Governor of Alabama, George Wallace, a white male. The "potential" for discrimination existed because the appointive powers and its corresponding influence were taken away from the legislative delegation responsible to the majority black Greene County voters and bestowed upon a governor who was responsible to the state-wide voters, 99% exclusive of Greene County voters and majority white in makeup. *Id.* at 176, 179.

The most recent district court decision overtly relying on a "change of constituency" analysis is *Robinson v.*

¹¹ Compare the timing of this legislation with Russell County's 1979 reallocation of day-to-day road and bridge authority which occurred seven years before appellants Mack and Gosha or any other black was elected to the Russell County Commission.

Alabama State Board of Education, 652 F.Supp. 484 (M.D. Ala. 1987) (three-judge panel). The district court was called upon to analyze Perry County's shift in Marion city school authority from a county board of education elected county-wide by a black majority to a city board of education appointed by Marion City Council members who were, in turn, elected by the city's white majority. *Id.* at 485. The panel's order, drafted by Judge Thompson¹², extended § 5 coverage "[f]irst," because "the resolution changed the constituency that selected those who supervised and controlled public schools within the city." *Id.* at 486 (emphasis in original). The court continued to explain that "[p]rior to the resolution, county voters elected the board members who controlled public schools in the city; under the resolution, however, the city council selected the board members who controlled city schools." *Id.* (emphasis in original).

The common denominator in *Horry*, *Hardy* and *Robinson*,¹³ all cases where § 5 coverage was extended, is a potential for discrimination which arises out of a change in constituencies whereby minority voting strength can be either overtly or covertly diluted. This "relevant attribute"¹⁴ is conspicuously absent from the Russell County legislation in the case at bar. Before 1964 and up until

¹² Judge Thompson, ironically, was a dissenter in the lower court's ruling in the case at bar.

¹³ Arguably, *County Council of Sumter County, South Carolina v. United States*, 555 F.Supp. 694 (D.C.D.C. 1983) relies on a change in constituency analysis for its holding also but not as explicitly as *Horry*, *Hardy*, and *Robinson*.

¹⁴ This term is taken from *Hardy v. Wallace*, *supra*, at 178.

1979, the county commission as a whole held general supervisory authority over the county road system and delegated direct or day-to-day supervision of the road system to three rural district county commissioners elected at large and responsible to the county as a whole. The 1979 enactments maintained the vestment of general supervisory authority in the Russell County Commission, but delegated the direct or day-to-day authority over county road operations to a professional county engineer appointed by, and under the authority of the same county commission. The three judge panel put it most succinctly when it found that "[b]oth before and after the 1979 change, the official responsible for road operations in each district was elected by, or responsible to, all the voters of the county." JS A-16.

While *Horry*, *Hardy* and *Robinson* all use the constituency analysis to extend § 5's coverage, Judge Vance implicitly recognized in *Hardy* that the same reasoning could be used to limit § 5 coverage when he, in dictum, opined:

The ordinary or routine legislative modification of the duties or authority of elected officials or changes by law or ordinance in the makeup, authority or means of selection of the vast majority of local appointed boards, commissions and agencies probably are beyond the reach of section 5, even given its broadest interpretation.

Hardy at 178, 179. The instant lower court in its wisdom recognized the Russell County scenario as the vehicle in which Judge Vance's cautionary dictum in *Hardy* would ripen into a ruling.

3. The District Court's ruling is consistent with prior positions held by the Justice Department emphasizing change in constituencies as indicative of potential for discrimination.

While the Justice Department has decided to support the Appellants in the instant case, their position generally upon reallocation of authority and the impact of a change in constituency is far from settled. This conclusion is evident not only from the Department's failure to promulgate applicable regulations on the subject, *see* JS A-15, but also from its position in earlier cases which is contrary to its stand today. As recently as 1985, the United States Attorney General wrote the Alabama Attorney General concerning the *Hardy* legislation, described *supra*. The Justice Department first objected, then withdrew its objection to the *Hardy* legislation stating, "[i]t is certainly not the case that every reallocation of governmental power is covered by Section 5."¹⁵ *See* Appendix B to *Hardy v. Wallace*, 603 F.Supp. at 181. While the Justice Department may claim that its position in *Hardy* favoring such a § 5 limitation is merely a recent aberration, the truth is that as early as 1969 the Department embraced the position that, "Section 5 applies to laws [that] substantially change the constituency of certain officials" *Perkins v. Matthews*, 400 U.S. at 391, n.10, quoting the Justice Department's *amicus* brief in *Fairley v. Patterson*, 393 U.S. 544 (1969). From any fair reading of the Justice

¹⁵ It appears that, to some extent, it was *Hardy v. Wallace* that led Alabama's Attorney General to decide that it was unnecessary to submit Russell County's legislation for federal preclearance. (Stipulated Testimony of Lynda K. Oswald, A-10). The unit system or modified unit system is currently operating in 45 of Alabama's 67 counties.

Department's position in both *Hardy* and *Fairley*, one is caused to wonder why the Department did not choose to write its *amicus* brief in favor of Appellee.

B. The County Commission by state law has always held general supervisory authority over the county road system and therefore, the delegation of "ministerial" road and bridge duties to an appointed county road engineer does not effect a "change" within the meaning of Section 5.

While the Alabama District Court focused on the linkage between changes in constituency and potential for discrimination, the Appellee has, throughout the proceedings, asserted a subtly different additional ground for the denial of § 5 coverage in this case: given Alabama's history of investing the county commission with ultimate or general supervisory authority over county road operations, the 1979 Russell County enactments simply did not effect a "change" within the meaning of § 5. A comparison with the ruling of the district court is helpful. The district court found, in terms of constituency, "[b]oth before and after the 1979 change, the official responsible for road operations in each district was elected by, or responsible to, all the voters of the county. Thus, there was no *change* in potential for discrimination against minority voters." JS A-16 (emphasis in original). The Appellee's proffered alternative ground is similar. Both before and after 1979, the county commission was clothed with the ultimate authority over county road and bridge systems. The fact that in 1979 ministerial or administrative road duties once delegated to rural district commissioners were rerouted to a county employee, the county engineer, is irrelevant in terms of § 5.

1. Under Alabama law the county commission acting as a unit has always been vested with general supervisory authority over the county's road system with the power to delegate administrative or ministerial duties to subordinates.

The appellants have attempted to convince the Court that prior to 1979 Russell County commissioners were autonomous road bosses who reigned sovereignly over their road district "fiefdoms". While this has never been the *practice* in Russell County or anywhere in Alabama; more significantly, it has never been the *law* in Alabama.^{16 17} Although admittedly the rural district commissioners exercised direct supervision¹⁸ over his residency district's road maintenance, the county commission has always been entrusted with "general superintendence of public roads and bridges." See *Court of Commissioners of Pike County v. Johnson*, 229 Ala. 417, 419, 157 So. 481

¹⁶ The relevant sections of Alabama's code which describe the road and bridge authority of the county commission and what authority, duties, or functions may be delegated to a county road engineer or supervisor are set out in Appellee's appendix. See A-5, *Alabama Code*, 1975, § 23-1-80 (Michie 1986 Repl. Vol.) and A-8, *Alabama Code*, 1975, § 11-6-3 (Michie 1989 Repl. Vol.)

¹⁷ In other contexts, this Court has looked to state law to determine the authority and function of local officials, see, e.g., *St. Louis v. Praprotnick*, 485 U.S. 112, 124 (1988) (Section 1983).

¹⁸ Appellee employs the term "direct supervision" to mean day-to-day responsibility for completion of tasks and overseeing of workers as opposed to "general supervision" which denotes a responsibility for the formulation of long range objectives and major budget allocations.

(1934). Any duty or power held by the individual district commissioner was "*administrative in character*" and would be "*subordinate to, in co-operation with, and in aid of this court [of commissioners], which is still vested with general jurisdiction and supervision. . . .*" *Id.* at 420 (emphasis added). The state's supreme court in *Court of Commissioners* unequivocally rejected the notion of autonomous district commissioners.

. . . [T]here was no intention to transfer these governmental powers from the governing body of the county and vest them in the commissioner of each district. Such construction would destroy the unity of county government, and set up several rival government units of one man each, which, with undefined powers, would lead to great confusion.

Id. at 419. Clearly, no individual commissioner wielded the kind of autonomy over road and bridge matters, even within his residency district, that is suggested by Appellants.

Further, the creation of the post of county road engineer who would be responsible for direct supervision of road construction and maintenance took nothing away from the county commission in terms of road and bridge authority. In *Thompson v. Chilton County*, 236 Ala. 142, 181 So.701 (1938), Alabama's Supreme Court interpreted a statute apparently very similar to the 1979 Russell County legislation at issue. The *Thompson* opinion described the limitations of the county road supervisor's authority (precursor to the county road engineer) in terms virtually identical to *Court of Commissioner's*

could, under some circumstances, require preclearance. For example, if the Etowah County Commission had passed a resolution saying "the salary for each county commissioner shall be \$25,000, except that the commissioner from District 5 shall receive a salary of only \$1," such a change would require preclearance under the rationale of *Dougherty County*, because it has the obvious potential to deter candidates responsive to the majority-black community in District 5 from running. Cf. *Huffman v Bullock County*, 528 FSupp 703 (MD Ala 1981) (§ 5 preclearance is required for a change in office administration policy that requires an elected official to pay the salaries of his support staff because it might discourage blacks from seeking the elective office).

In this case, the possibility that the Common Fund Resolution is simply another chapter in Etowah County's sorry history of depriving its black citizens of their right to vote "and the consequent advantages that the ballot affords," *Gomillion*, 364 US at 346, is simply too obvious to be ignored. The Common Fund Resolution, like the Road Supervision Resolution, must be submitted for preclearance.

Respectfully submitted by,

Edward Still
Counsel of Record
714 South 29th Street
Birmingham AL 35233-2845
205-322-6631

Pamela Karlan
University of Virginia
School of Law
Charlottesville VA 22901
804-924-7810

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James U. Blacksher
John C. Falkenberry
Leslie M. Proll
Title Bldg., Fifth Floor
300 21st Street North
Birmingham AL 35203
205-322-1100

Lani Guinier
Law School of University of
Pennsylvania
3400 Chestnut Street
Philadelphia PA 19104-6204
215-898-7032